

REMARKS

Pursuant to the present amendment, claims 39-42, 44-54 and 56 have been amended. Claims 39-56 are pending in the present application. No new matter has been introduced by way of the present amendment. Support for the present amendments may be found at, for example, page 10, line 7 – page 11, line 15; page 13, line 5 – page 15, line 13; Figures 1a, 1b (and the associated discussion of those drawings). Reconsideration of the present application is respectfully requested in view of the amendments and arguments set forth herein.

In the Office Action, claims 39-56 were rejected under 35 U.S.C. § 103 as allegedly being unpatentable over Besser (WO 03/007368). Applicants respectfully traverse the Examiner's rejections.

As the Examiner well knows, to establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination must not be based on applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991); M.P.E.P. § 2142. With respect to alleged obviousness, it is necessary for the Examiner to identify the reason why a person of ordinary skill in the art would have combined the prior art in the manner claimed. The mere fact that the prior art can be combined or modified does not make the resultant combination obvious. *In re Mills*, 916 F.2d 680, 16 U.S.P.Q.2d 1430 (Fed. Cir. 1990); M.P.E.P. § 2143.01.

Pursuant to the present amendment, the pending claims have been amended to present a very specific embodiment of the invention for examination. The primary reference, Besser, fails to disclose or suggest many aspects of the presently claimed invention. For example, Besser does not disclose or suggest the formation of the intermediate layer now recited in the pending claims. Additionally, some of the pending claims, *e.g.*, claim 54, recites specific stoichiometric ratios for the first and second sub-layers. Such details are simply not disclosed or suggested in Besser or any other art of record.

Accordingly, it is respectfully submitted that none of the art of record, considered individually or in combination, disclose or suggest the subject matter defined by the pending claims.

A recent Federal Circuit case makes it crystal clear that conclusory statements regarding common knowledge and common sense are insufficient to support a finding of obviousness. *In re Lee*, 61 U.S.P.Q.2d 1434 (Fed. Cir. 2002). It is respectfully submitted that any assertion that the inventions defined by the presently amended claims would have been obvious in view of the art of record would constitute an impermissible use of hindsight using Applicants' disclosure as a roadmap.

For at least the aforementioned reasons, it is respectfully submitted that all pending claims are in condition for immediate allowance. The Examiner is invited to contact the undersigned attorney at (713) 934-4055 with any questions, comments or suggestions relating to the referenced patent application.

Respectfully submitted,

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Date: June 22, 2007

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